

IN THE HIGH COURT OF TANZANIA
AT DODOMA

(DC) CRIMINAL APPEAL NO. 85 OF 2009

**(Originating from Singida District Court
Criminal Case No. 255 of 2007)**

ATHUMANI MUNA APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

JUDGMENT

04/11/2010 & 15/11/2010.

KWARIKO, J:

The appellant herein stood before the trial court charged with the offence of Rape contrary to section 130 (1), (2) (e) and 131 (1) (3) of the Penal Code Cap. 16 Vol. 1 of the Laws Revised Edition 2002. The appellant had denied the charge and at the end of the trial he was convicted and sentenced to thirty (30) years imprisonment. The appellant was not satisfied with conviction and sentence hence filed this appeal where he raised about eleven (11) grounds of appeal. The appellant's grounds of appeal which he prepared through his lay hand can conveniently be condensed into four main grounds as follows;

1. That, the trial court erred in law and fact when it convicted him on an insufficient circumstantial prosecution evidence.

2. That, the trial court erred in law and fact when it believed an uncorroborated evidence of the complainant, (PW2).
3. That, the trial Magistrate erred in law and fact to believe the prosecution witnesses who were all family members whose evidence was not corroborated by important witnesses like village leaders.
4. That, the trial court erred in law when it based its decision on the prosecution evidence only and failed to properly consider the defence evidence.

When the appeal was called for hearing at first the appellant argued this court to consider his grounds of appeal and allow the same. On the other hand the Respondent Republic was represented by Ms Nsana learned State Attorney whereas in her submission she supported the trial court's conviction and sentence in respect of the Appellant; she gave reasons for this stance. Then, in his rejoinder the appellant amplified his grounds of appeal and explained his reasons for his dissatisfaction with the trial court's decision.

Among the appellant's grounds of appeal this court is particularly interested in ground number four which says that the trial court did not properly consider the defence evidence and instead it relied heavily on the prosecution evidence when it convicted the appellant.

In her submission Ms Nsana objected this ground of appeal when she contended that the trial court's judgment considered both the prosecution as well as the defence evidence. In his rejoinder submission the appellant contended that the trial court erred when it failed to summon his defence witnesses one Issa Aláhi and Abdallah Sukari he had enlisted earlier. I will decide this ground of appeal first since if resolved in the affirmative the appeal would not be decided on its merits.

I have gone through the trial court's record and found that when the prosecution case was closed on 5/11/2007 the court ruled out that a ***prima facie*** case had been established against the appellant. A date for his defence was fixed to be 12/11/2007 and an order to summon two witnesses for the defence was issued. These were Issa Alahi and Jumanne Sukari all from Masweya village. On 12/11/2007 the appellant informed the court that he was not feeling well hence his defence was not taken until on 15/11/2007 when he testified. It was not shown that the said witnesses were ever summoned and attended in court. The court record does not bear testimony that the summonses were prepared and addressed to the witnesses whose address was given by the appellant.

Since the appellant was in custody, it was the duty of the court to make sure that his witnesses were duly summoned to come to court for his defence. The trial court's act to abdicate this important duty occasioned failure of justice on the part of the appellant. The record does not show that the appellant had ever closed his defence

case when the matter was set for judgment. This shows that the appellant believed that his witnesses were still to come to testify on his behalf. We have no idea what these witnesses could have testified and what effect could their testimony have brought in the case.

The foregoing was a fatal irregularity which violated the appellant's right to a fair trial. The right to a fair trial is provided in the Constitution of the United Republic of Tanzania, 1977 where Article 13 (6) (a) thus provides;

“When the rights and duties of any person are being determined by the court or any other agency, that person shall be entitled to a fair hearing and to the right of appeal or other legal remedy against the decision of the court or of the other agency concerned”.

Fair hearing includes a right to have defence witnesses heard before a decision is reached. In this case the appellant was not accorded fair hearing when his witnesses were not summoned and heard [see ***SAMWEL LESILWA VR, Criminal Appeal No. 160 of 2008, Court of Appeal of Tanzania, Dodoma Registry, (unreported)***].

Thus, the appellant was not fully heard and hence his defence was not completed before the trial court adjudged him. The record of

the trial court also shows that when the prosecution case was closed and a ***prima facie*** case was ruled out to have been established in respect of the appellant, the court did not address him in terms of section 231 of the Criminal Procedure Act, Cap. 20 Vol. 1 of the Laws, Revised Edition 2002, which provision spells out the accused's rights on his/her defence and the same is couched in the mandatory terms. This was also a fatal irregularity which vitiates the proceedings.

Since the appellant's right to a fair trial was violated by the trial court. I find the proceedings thereof were a nullity and are hereby quashed and set aside. Thus, the appellant's appeal is allowed for reason that he was not accorded a fair trial.

For the interest of justice I hereby order that this case be remitted to the trial court so that the same could be heard ***de novo*** by another Magistrate of competent jurisdiction. Order accordingly.



(M. A. KWARIKO)

JUDGE

15/11/2010

Court: Rights of appeal fully explained.



(M. A. KWARIKO)

JUDGE

15/11/2010

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ellant: Present.

r Respondent: Mr Kyando, State Attorney.

c: Ms Komba.



(M. A. KWARIKO)

JUDGE

15/11/2010